



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
MISCELLANEOUS CAUSE NO. 22'A'OF 2020
IN THE MATTER OF AN APPLICATION OF DECLARATION OF
DEATH OF ANTHONY MUCHIRI NJOGU (DECEASED)

AND

IN THE MATTER OF ARTICLE 2(5), 46(1), 48 & 159 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 118A OF THE EVIDENCE ACT CHAPTER 80 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 1A, 1B & 3A OF THE CIVIL PROCEDURE ACT,

CHAPTER 21 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 51 RULE 1 OF THE CIVIL PROCEDURE RULES 2010

EVANGELINE RWAMBA DIFATHA aka EVANGELINE RWAMBA NGUO.....1ST APPLICANT

MERCY MURUGI NJOGU.....2ND APPLICANT

JAMES KINYUA NJOGU.....3RD APPLICANT

RULING

A. Introduction

1. The Applicants herein moved this court vide an application dated 12th March, 2020 seeking for the following orders: -

- 1) That ANTHONY MUCHIRI NJOGU be and is hereby presumed dead.
- 2) That this Honourable Court do order the Registrar of Births and Death to issue a death certificate in respect of ANTHONY MUCHIRI NJOGU.
- 3) That consequent to the grant of the prayers above the Honorable Court be pleased to issue such further direction and orders as may be necessary to give effect to the foregoing orders, and/ or favour the cause of justice.
- 4) That costs be in the cause.

2. The application was based on the grounds on the face of the application and further supported by the affidavit of Evangeline Rwamba

Defatha, Mercy Murugi Njogu and James Kinyua Njogu, the Applicants herein. In a nutshell, it was the applicants' case that the Anthony Muchiri Njogu had not been heard of since 31/10/2012 and that efforts to trace him and/ or his whereabouts had been to no avail and further that it was more than seven (7) years since his disappearance. Further that his disappearance had been reported at Nyali Police Station and Central Police station vide OB Nos 10/1/11/2012 and also print media vide the Star Newspaper of 19/11/2012. That there had been a diligent but unsuccessful search for the said Anthony Muchiri Njogu and in the circumstances there was overwhelming support of the belief that he should be presumed dead as there was no evidence whatsoever that he was living.

B. Issues for determination

3. I have considered the application herein, the supporting affidavit by the applicants herein and the annexures thereto and it is my view that the main issue for determination is whether the applicant has made a case for the grant of the orders sought.

C. Applicable law and determination

4. The instant application was brought under Section 118A of the Evidence Act among other legal provisions. The Section 118A provides: -

“Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead.”

5. From the above provision, a presumption of death ought to be made where it is proved that: -

i. The person subject of the application has not been heard of for seven years

ii. The said person must not have been heard of for the said period (of seven years) by those people who might be expected to have heard of him if he were alive.

6. The 1st, 2nd and 3rd applicant deposed to the effect that the said Anthony Muchiri Njogu was living in Embu when he developed some mental illness and after which he was taken to a rehabilitation centre in Nairobi Brightside D.A.R.T Centre from where he absconded and that none of the applicants has heard of him ever since the date he absconded being 31/10/2012. Further that despite the applicants searching for him from any possible place and further having advertised the loss through media adverts, nothing came out of the exercise. And the foregoing culminated to filing of this application that it is over seven (7) years since the missing person disappeared and that his whereabouts are unknown to date. It is my opinion that it is not in dispute that the missing person herein has not been heard since October 2012 and which period is more than seven (7) years.

7. It is a requirement for such application to be allowed that the said person ought not to have been heard of for the seven-year period by those people who might be expected to have heard of him if he were alive. The 1st applicant deposed that the missing person's father was deceased and attached the deceased's death certificate. The said father being one of the persons who ought to have heard from the missing person, he ought to be excluded from that requirement of the law for he is deceased.

8. The 1st applicant further deposed to the effect that the missing person was not married but had two siblings, a sister and a brother and who are the 2nd and 3rd applicants. The two applicants swore affidavits affirming the fact that they were siblings to the alleged missing person and that they had not heard from him since 3/10/2012. In my view, the applicants have satisfied the second requirement that the missing person has not been heard or seen by those who ought to have heard from him.

9. It is imperative that presumption of death though rebuttable is a serious matter and that for a court to grant a prayer of such nature it ought to be satisfied that the legal requirements have all been satisfied. The applicants annexed to the application, a police abstract from Central Police Station showing that the report was made on 1/11/2012 at Central Police Station. Also annexed is a letter from the Chief Gaturi South location to that effect dated 22/01/2020.

10. It is my finding that the applicant has satisfied this court as to the requirement of the law through the evidence presented herein.

11. I find that the application has merit and I allow accordingly.

12. It is hereby so ordered.

DATED and SIGNED at EMBU this 19th day of November, 2020.

F. MUCHEMI

JUDGE